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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Consolidated Cases No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING COMPANY, GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY,
Petitioners,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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RESPONDENT'S STATEMENT OF THE CASE.

In accordance with Rule 40(3) of this Court, respondent submits the following statement solely for the purpose of correcting certain inaccuracies contained in the statement by petitioners in their petition herein.

THE EVIDENCE.

Early on the morning of January 31, 1955, two noises were heard in the vicinity of Moniteau and Moreau Streets, in Tipton, Missouri (R. 19, 20). The first noise was a kind of a thud, which sounded like something cracking or breaking (R. 20) (S. R. 3). Nothing was observed after the first noise and, after an interval of about three minutes, there was a second noise, louder than the first, which sounded like an explosion (R. 20) (S. R. 3). It was the position of the gas company that the first noise was the collapsing of the old building; that the collapse caused gas pipes inside to break, and that gas escaping therefrom caused the explosion. Immediately after the second noise fire was observed in the Martin building (R. 20). This fire was on the second floor of that building at the corner (R. 21) (S. R. 4). The fire alarm was turned in and within a few minutes several persons, including the volunteer fire department, arrived at the scene (R. 15, 19, 21, 33, 74). Two experts for the plaintiffs, one of them having examined the damaged buildings and debris a few days after the fire, agreed that the casualty was caused by a gas explosion (R. 39, 47). Defendant's expert testified that the first noise was not a gas explosion because there was no blasting effect or flame. He testified that the second noise was a gas explosion (R. 69).

When the volunteer fire department arrived within a few minutes after the second noise, the west wall of the building was already down and debris covered the sidewalk including a gas meter located at the west side of the building (R. 15, 74). In addition, an inside wall which was the next one east from the west wall, had collapsed by the time the firemen had arrived. There was a jet of flame which resembled a torch blaze, which the fire-

men were unable to put out, on the second floor next to the collapsed inside wall (R. 74, 75).

At the point where the meter was located on the sidewalk the bricks from the collapsed wall were in a pile three or four feet high and the meter itself was broken (R. 16, 53). After the debris had been removed from the meter, and after an excavation had been made around the service pipe that was buried in the ground below the meter, it was found that there was a hole in that pipe at a point about twenty-nine inches below the surface where the pipe elbowed from the vertical riser to go horizontally under the sidewalk (R. 52, 59). It was generally agreed that this hole probably was the result of a scaling process known as corrosion, and plaintiffs' experts admitted that such scaling could be held in position against a pipe by surrounding ground with no trouble and that it would be possible for a wall to fall on the pipe and shake the corrosion scale loose, leaving the hole which was found after this casualty (S. R. 16).

Evidence of the Condition of the Pipe and the Question of Knowledge of Facts Putting Defendant on Inquiry.

The service pipe in question was a one and one-fourth inch pipe which ran from the meter on the west side of the building straight down for forty-two inches where there was an elbow. From that point it ran horizontally under the sidewalk for a distance of approximately seven feet where it connected, just beyond the curbing, with a curbcock. Defendant had a four inch gas main running north and south about four feet from the opposite side of the street. From that four inch main there was a two inch main extension running across the street toward the building in question to a point about two feet from the east

curbing. At that point there was a T connection from which a one and one-quarter inch pipe ran about eleven feet east to the curbcock which connected with the service pipe in question. Another section of the one and one-quarter inch pipe extended about twenty-one feet west to another curbcock connecting with a service pipe leading to a second meter also on the outside of the building in question (S. R. 33, Ex. 17). That service pipe in which a hole was found after the casualty was removed in its entirety and was examined by plaintiffs' experts. All portions of the pipe that had been below the ground showed characteristic signs of soil corrosion (R. 38). However, the degree of corrosion varied and a different degree was found just twenty inches from the hole (S. R. 11). With the exception of the one hole at the elbow, the remainder of this pipe was found to be fairly sound in that there were no holes in it and it would carry gas (S. R. 11). Even using a magnifying glass to go up and down the pipe, the plaintiffs' experts were unable to find any hole in the pipe except that in the elbow, and admitted that, if that part of the pipe out into the street had been opened for inspection, no hole would have been obvious or visible; that it would be necessary to go through under the sidewalk to the elbow before any visible hole could have been found (S. R. 15, 16).

Defendant's four inch main had been installed along the west side of the street, across from the building in question, when gas was first introduced in Tipton, which was about 1931 or 1932 (R. 18, 50, 53). There was no testimony as to when the two inch line leading from the four inch main across the street toward the Martin building was installed, but one witness stated he thought this took place something like 1932 or 1933 (R. 32) (S. R. 9). There was no direct testimony when the service line lead-

ing up to the meter was installed, but this same witness stated that he thought it was laid at the same time as the two inch line (R. 32) (S. R. 9). There was positive testimony that the meter was installed in 1939 and that there had been no meter outside the building at the location of this service pipe prior to that time; that when the meter was installed there was evidence of fresh digging underground (R. 76, 77) (S. R. 22). The Telephone Company was one of the first users of gas in Tipton, and was occupying the second floor of the west Martin building when gas was first installed (R. 18). It was not shown whether that service for the Telephone Company came in from the alley at the rear of the property or came in from the street, the witness not recalling that fact (R. 19) (S. R. 1). The two inch line crossing the street east from the main was installed by employees of the gas company that distributed gas in Tipton at that time (R. 33). The Telephone Company did not install Exhibit 25, which was the service pipe involved in this action (R. 18, 19). All witnesses testified that they did not know who installed this line (R. 18, 19, 33) (S. R. 2).

In October, 1950, the defendant replaced thirty-four feet of the two inch line running across the street from the four inch main. In July, 1951, the defendant replaced six hundred twenty-five feet of its four inch main, most of which was located in the alley at the rear of the building in question (R. 52, 53). This alley was one hundred sixty feet west of the connection of the two inch main extension with the four inch main, across the street from the west side of the Martin building (Defendant's Ex. 17, S. R. 33). The thirty-four feet of two inch line was replaced because it had leaks in it. However, one of the principal reasons for replacing the more than five hundred feet of four inch main in the alley was that it was buried six to nine feet in the ground. It was so deep that

it required a great deal of time digging. Defendant wanted to get a more shallow line in the alley so that the line could be maintained by it more efficiently (R. 57) (S. R. 19).

There was no evidence in the record that defendant had any knowledge as to the length of time the service pipe in question had been in the ground, because there was no proof as to the date of its installation. The defendant did not tell Mr. Martin, owner of the building, that it had replaced the pipe owned by it in 1950 and in 1951 (R. 59, 60). When the defendant dug up the service pipe in question after the casualty (it was never stated to be "the pipe which caused the casualty"), it was then found (as of January 31, 1955), to be in about the same corroded condition as the two inch pipe had been when it was removed in October, 1950, or four years and three months earlier (R. 54).

In its instruction to the jury, the trial court, with reference to the defendant's duty, told the jury that if the defendant knew, or by the exercise of ordinary care, could have known that there were defects in the line which made it imminently dangerous and unsafe for transporting gas, then defendant had a duty either to repair or to shut off the gas and to notify Martin to make repairs before the line should be used for gas; that it was not necessary for the defendant to be liable, to have actual knowledge of the location and size of the defect and leak, but only necessary that the defendant had knowledge of surrounding facts and circumstances sufficient to indicate that there was either a leak or a defect of such nature that there was danger of an imminent leak (R. 88). The trial court also charged the jury that if the defendant knew, or by the exercise of proper care, could have known, that there was gas actually escaping from the line, then the defendant

had the same duty to do something in respect to the escaping gas and either to repair the line or to shut off the gas until Martin did so (R. 101). The trial court further instructed the jury that if the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, which an ordinarily prudent and careful person would consider as a reasonable period of time, that, if this particular pipe had a defect in it, it would leak gas, then the defendant would be required to take some action in respect to the service line (R. 89).

After the jury had retired and was deliberating, it requested the trial court to repeat for it that part of the charge dealing with the responsibilities of the defendant with reference to testing the service line from the curb-cock to the meter and its responsibility to notify plaintiff, Martin. At that time the court repeated its instruction regarding the duties of the defendant, out of context with the rest of its original charge. It then instructed the jury that the defendant's only duty to act with reference to this service line would arise, if it did, after the defendant had some knowledge of the leakage of gas from the service line, or, knowledge of surrounding facts and circumstances which would lead the defendant, or a careful and prudent person engaged in the same line of business, to know that a defect existed in that line which would imminently cause gas to leak therefrom; that, if the defendant had "knowledge of surrounding facts and circumstances which would lead the defendant to know or by the exercise of ordinary care it should have known, that there were any defects in the line which would imminently cause gas to leak from that line", then the defendant had the duty either to repair the line if it continued to permit gas to flow through it or to warn plaintiff Martin of the con-

dition and require him to make repairs and shut off the gas until he did so (R. 99, 100).

At the same time the court also told the jury that if the defendant knew, or "by the exercise of that degree of care which the law places upon it, could have known" that there was gas escaping from the line, then the defendant had the same duty with respect to the escaping gas and should either repair the line or have had plaintiff Martin repair the line and shut off the gas until he did so (R. 101).

Evidence As to Ownership and Control.

The evidence in this case was undisputed that the service pipe in question was located outside the property line of Mr. Martin and was under the sidewalk. There was, however, no evidence showing any ownership of the service line by the defendant gas company at any time. On July 21, 1930, defendant's predecessor company was granted the original franchise to supply gas in Tipton, Missouri, by Ordinance 108 (Defendant's Ex. 31, R. 62, 63). Section 4 of that ordinance contained the following provision:

> "Grantee shall furnish free of charge and install for his customers reliable meters or other instruments for the measurement of gas sold and shall keep the same in repair without cost to the customer; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test said meters and devices at reasonable times. Grantee shall also furnish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curbline, if such mains are located in the street and from mains to the property line, if same be located in alleys*, and all such mains and laterals

shall be adequate in size and construction." [Emphasis supplied].

The rules and regulations of the defendant's predecessor, effective November 1, 1931, and approved by the Missouri Public Service Commission, were received in evidence as Defendant's Exhibit 1. Page 4 of those regulations (S. R. 27) contained the following pertinent paragraphs:

> "7. *Service Lines.* The service line shall be connected to the company line at curb or lot line and shall be constructed, tested and approved in accordance with the rules and regulations established by the company.
>
> * * *
>
> "9. *Customer Responsible for Maintenance of Lines.* All service and house lines from the curb or lot line shall be kept and maintained in good condition by the customer or owner. When leaky or hazardous conditions of the service or house lines are found, repairs shall be made promptly by the customer or owner."

Page 9 of Defendant's Exhibit 1 (S. R. 31) contains the following provision:

> "6. *Owners Shall Maintain Own Lines Satisfactorily.* All service and house lines and fixtures from the curb or lot line installed at the expense of the owner or customer shall be kept and maintained in condition satisfactory to the company. When inspected and found in leaky or hazardous condition the gas will be shut off until repairs are made."

The evidence was undisputed that the defendant's main from which service was supplied to the buildings of the plaintiff Martin was located in the street and not in an alley (Plaintiffs' Ex. 17, S. R. 33). Plaintiffs' Ex-

hibit 23, the deed of plaintiff Martin to the property in question (S. R. 35), recited that he was to have the described premises "with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining".

The only evidence with reference to control of any of the instrumentalities involved was testimony that the defendant gas company had exclusive control over the meter, which they tested and checked themselves and which they would not permit anyone else to test or check without their permission (S. R. 17). There was no testimony, as stated by petitioners, that the defendant "alone had the right and ability to control the pipe and the flow of gas into it, and to test the pipe for leaks".

The evidence showed that it was the opinion of the experts called by the plaintiffs that there had been a hole in this pipe for as much as six months before the fire in the size that it was found after the fire had occurred (R. 42, 47), and that gas under four pounds of pressure, if the hole had existed that long, would have leaked out of it and gone into the building in substantial quantities during all of that time (R. 42, 47) (S. R. 12, 13, 15). All expert testimony established that, if gas had been leaking from any hole in this pipe, it would have been going into the building, rather than remaining under the sidewalk or under the street (R. 42, 47, 67). Under the circumstances that existed in this building, had gas been leaking from a hole in this pipe it would have been going into the building every weekend when it was closed, probably at times reaching dangerous proportions, but there was no ignition before this time, according to plaintiffs' expert witness (R. 42). However, no one had smelled natural gas in the building at any time before the fire (R. 23, 77).

The service pipe with the hole in it was removed without the express permission of Mr. Martin by the defendant, after the fire, but it was removed with his knowledge, since he was present when it was being dug up. He did not ask the defendant's employees why they were removing the pipe and did not either complain or protest (R. 27) (S. R. 20).

At the close of plaintiffs' case, the trial court ruled that there was no evidence to the effect that the defendant company was the owner of the service pipe under the sidewalk; that the rules and regulations in force at the time the pipe was laid showed that the ownership of the service pipe in question was in the owner of the premises; that, absent direct proof of ownership in the defendant, it would be held, as a matter of law, that the service pipe belonged to the plaintiff Martin (R. 65, 66).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ALLOWED.

I.

There Was No Conflict Between the Decision of the Court of Appeals and the Applicable State Law.

Petitioners contend, at the outset, that the trial court instructed the jury that the defendant "under no circumstances had any duty to make any inspection or inquiry as to the condition of the pipe in question absent actual, direct knowledge of the leak". They then, in their footnote No. 4 on Page 7, attempt to paraphrase the court's instruction. In so doing, they have omitted certain vitally important portions of the instruction, which respondent desires to quote, verbatim. These are as follows:

"However, if the defendant knew, or by the exercise of ordinary care, could have known that there were defects in said service line which made the service line imminently dangerous and unsafe for the transportation of natural gas, and that the defendant knew or by the exercise of ordinary care, could have known that said service line was then and there imminently dangerous and unsafe, and that there was some immediate danger then existing of the escape of natural gas from said line, then defendant had the duty to repair said line or to take some action in respect to said line or notify Mr. Martin to make repairs thereto before the service line was continued to be used for natural gas.

"Now, under the law, it was not necessary that the defendant have actual notice of the location and size of the defect and leak of gas from the service line in question. If defendant had knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line if it was immediately continued to be used to transport natural gas, then it may be said that the defendant had knowledge of facts sufficient to cause it to reasonably act in some respect as to the service line in question." (R. 88).

"The knowledge of any surrounding facts and circumstances which you find that the defendant should have had notice of should be such as show that the defendant had notice of some defect in the service line from which gas was leaking, or from which gas would with some immediacy leak, or which would imminently leak if the service line was continued to be used for the transportation of natural gas, and not such notice to defendant that gas would merely probably leak from said service line sometime in the distant or remote future." (R. 89).

"* * * If the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know and have notice that there was an imminent danger, that is, a danger within a reasonably short period of time, which an ordinarily prudent and careful person would consider as a reasonable period of time, that if this particular pipe had a defect in it it would leak gas, then the defendant would be required to take some action in respect to the service line. But if the defendant did not have actual notice of the leaking of gas from the service line or by the exercise of due care could not have had such knowledge, and there were no facts revealed to the defendant from which the defendant would have knowledge or notice that there was imminent danger of a leak in the service line, that any conditions existing in the service line liable to leak gas were remote or contingent, then the defendant would not be liable and there was no duty on the part of the defendant in this case to take any action in respect to this particular piece of service line that was introduced in evidence before you." (R. 89, 90).

"* * * if you further find that prior to the time of said explosion and fire the defendant, acting by and through its agents and employees, knew or in the exercise of that degree of care which is placed upon the defendant as a distributor of natural gas, should have known of the defective condition of said service line and the leakage of natural gas therefrom in time by the exercise of ordinary care on the part of the defendant to have prevented said explosion and fire by either repairing or causing said service line to be repaired, or warning Mr. Martin of leaks in the service line and shutting off the flow of gas therein until repairs were made in this service line by Mr. Martin, and if you find the defendant negligently failed so to do, then if you find those facts to be from the evidence you should return a verdict in this case in favor of all three of the plaintiffs and against the defendant * * *." (R. 90).

After the jury had retired to deliberate, it returned and requested the court specifically for repeated instructions regarding the duties and responsibilities of the defendant company for testing this particular service line and its responsibility to notify the plaintiff, Martin. In response to that specific request the court, among other things, gave the following instructions:

"* * * However, under the law and the facts of this case, the defendant's only duty to act in respect of that service line would arise, if it did arise, after the defendant had some notice of the leakage of gas from the service line, or knowledge of surrounding facts and circumstances which would lead the defendant, or a careful and prudent person engaged in the same line of business, to know that a defect existed in that line which would imminently cause gas to leak therefrom. That is to say that if the defendant had knowledge of surrounding facts and circumstances which would lead the defendant to know or by the exercise of ordinary care it should have known, that there were any defects in the line which would imminently cause gas to leak from that line, then it was the duty of the defendant to either itself make repairs to the line, if it continued to permit gas to flow through the line with such knowledge, or to warn Mr. Martin of the condition of that line and require Mr. Martin to make the repairs thereto and shut off the gas flowing through the line until he did make such repairs." (R. 99, 100).

"* * * If the defendant or by the exercise of that degree of care which the law places upon it, could have known that there was gas escaping from this line, that is, actually escaping from the line, then of course, the defendant had the same duty to do something in respect to that escaping gas and to either repair the line itself or have Mr. Martin repair the line and shut off the gas until he did so." (R. 101).

We have set out these portions of the court's charge to the jury because of the repeated assertion by petitioners that the trial court had refused to instruct the jury that "knowledge" included knowledge of facts putting a reasonably prudent person on inquiry. The instruction requested by the plaintiffs and refused by the trial court is almost identical with the very words used by the trial court in its charge to the jury.

Petitioners' contention that the court did not instruct the jury properly apparently results from petitioners' attempt to rely upon an isolated portion of the charge, which, standing alone, might be so considered. Such isolated portion apparently was relied upon by Judge Gardner in his dissent upon the motion for rehearing because, in his dissenting opinion, he cited only the following portion of the court's instruction (A. 13):

> "* * * under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shutoff cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to *make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.*" [Emphasis supplied].

Relying solely upon this isolated portion of the complete charge, Judge Gardner held that it did not properly instruct the jury, because it did not allow the jury to consider knowledge of facts or circumstances on the part of the defendant which would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe. He criticized this particular part of the charge as conflicting with the law of the State of Missouri (A. 14).

What petitioners consistently have overlooked, and what Judge Gardner obviously overlooked in his dissenting opinion, was the fact that, considered as a whole, the charge to the jury, not once but repeatedly, included an instruction that the jury could find for the plaintiffs if it found that the defendant had the very knowledge of surrounding facts and circumstances which petitioners were requesting should be included. It is a well established rule that whether instructions in a particular case could have produced a misconception in the minds of a jury is not to be ascertained by merely considering isolated statements. The court must take into view all the instructions given and tendencies of the proof in the case to which they could possibly be applied. If the charge as a whole correctly states the law, then it cannot be said that, merely because isolated portions are incorrect, the jury was improperly instructed. *Seaboard Airline Railway* v. *Padgett*, 35 S.Ct. 481, 236 U.S. 668, 59 L.Ed. 777.

Petitioners rely heavily upon the dissenting opinion of Judge Gardner on motion for rehearing. The dissenting opinion is set out in full on Pages 11 to 19 of the appendix. A careful reading of the dissent discloses that Judge Gardner had misconstrued the evidence in reaching the conclusions upon which he based his dissent. Thus, he stated (A. 11):

> "* * * The service here involved was installed under the supervision of and by the employees of defendant's predecessor in 1932 or 1933 and was part of its system * * *."

This was an obvious misconstruction, because there was no evidence in the entire record that the service pipe was installed "under the supervision of and by the employees of defendant's predecessors in 1932 or 1933". Petitioners offered only two witnesses concerning the installa-

tion of any line on Moreau Street. The complete testimony of both Witness Brant (R. 18, 19) (S. R. 1, 2) and Witness Thixton (R. 32, 33) (S. R. 9), discloses that any testimony of both witnesses was completely lacking in any probative effect, insofar as installation of this particular line was concerned. For example, while Witness Brant testified that the Telephone Company had been one of the first users of gas in Tipton in 1933 (S. R. 1), he also testified that he did not know whether or not, at that time, the gas service came into the corner building from a line back on the alley at the rear of the building; that he did not know when the meter on the sidewalk was put there; that he could not remember whether the meter was even installed at the time any kind of a line was run across the street and that he did not know who installed the line up to the meter. He could not testify that the gas company had installed it. All he said was that, wherever the gas service originally came from and whoever put that in, he did not know who paid for it or who did it (S. R. 2).

Witness Thixton testified only that he recalled that there had been a line laid across this street (S. R. 9). As far as he could remember he "would think" that this took place in 1932 or 1933, "something like that". (S. R. 9). However, he did not know who laid the line under this sidewalk, or when it was laid. The testimony of both these witnesses obviously lacked anything approaching probative force. They were the only witnesses produced by petitioners on the question of installation and ownership of this particular pipe.

The only positive evidence introduced in the case regarding installation of this particular service line was the testimony of Lonnie Bell, called as a witness by the defendant (R. 76, 77) (S. R. 22, 23). That witness testi-

fied that he rented the first floor of the west building as a restaurant in 1939, which was when he first went to Tipton (R. 76). (S. R. 22). At the time he looked at the building for the purpose of renting it, there was no gas service in the first floor and there was no meter on the outside of the building (R. 76). One of the conditions of renting was that gas service would be supplied for the restaurant stove. When he returned to move into the building, a meter was in place outside the building and there was evidence that the ground had been freshly dug up in that area (R. 76) (S. R. 22). Since there would have been no need for a service line under the sidewalk at this point until there was a meter and line into the building, and, since there had been neither a meter nor a line into the building in 1939, this testimony furnished the basis for a valid inference that the line in question had not been installed until that time, and that it had been installed by the owner of the building, from whom Bell was renting space. He had requested the owner to install such service as a condition of his renting the building.

Furthermore, Defendant's Exhibit 31 (R. 62, 63), which was the ordinance of the city of Tipton adopted July 21, 1930, granting a franchise to the predecessor of the Gas Company to install and operate a gas plant and distributing system in that city, clearly contained the following provision in Section 4:

> "Grantee shall furnish free of charge and install for its customers reliable meters or other instruments for measurement of gas sold and shall keep the same in repair without cost to the customers; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test such meters and devices at reasonable times. Grantee shall also fur-

nish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curbline, if such mains are located in the street,* and from mains to the property line, if same be located in the alleys, and all such mains and laterals shall be adequate in size and construction." [Emphasis supplied].

The specific wording of this franchise ordinance, which was shown as being in effect at all times, until replaced by another ordinance in May, 1948, clearly established that the predecessor company was neither obligated nor authorized to install service for any customer beyond the curbline, where the mains were located in the street. The main in question in this case was shown by all the evidence to be located in the street west of the Martin building. This franchise authority, coupled with the complete absence of any testimony establishing that defendant's predecessor had installed the service line in question, clearly contradicts the statement made by Judge Gardner in his dissenting opinion, set forth above.

Again, in his dissent, Judge Gardner stated (A. 11, 12):

"* * * The undisputed evidence showed that the defendant by reason of its franchise installed, maintained and controlled its main lines and all such service gas lines as were located in the public street, and that it and it alone had the right to control or the facilities to repair or inspect the same * * *."

The evidence set forth above clearly shows that this was a misconstruction, because there was positive evidence directly contradicting the statement that the defendant, under its franchise, had the right to install, maintain or control "all such gas service lines as were located in the public street". On the contrary, where, as here, the gas main was located in the street, defendant's franchise

permitted it to install pipes only to the curbline. Furthermore, the rules and regulations of the defendant's predecessor which had been filed with and approved by the Missouri Public Service Commission in 1931, and which were in force and effect at all times within which this service pipe may have been installed, provided in Paragraph 9 of Page 4 (Defendant's Ex. 1, S. R. 27) that all service and house lines from the curb or lot line "shall be kept and maintained in good condition by the customer or owner" and that when "leaky or hazardous conditions of the service or house lines are found, repairs shall be made promptly by the customer or owner". Since the service pipe in question was connected with a gas main located in the street, and since the franchise permitted defendant's predecessor, in such circumstances, to install service only to the curbing, it is obvious that this provision made the customer responsible for the maintenance of this particular service line from the curbing into his premises. Judge Gardner's statement to the contrary, was clearly erroneous.

Again, Judge Gardner, in speaking of pipes owned by the defendant which it had removed from the ground in 1950 and 1951 said (A. 15):

> "* * * It had notice of the length of time that these pipes were in the ground and it also had notice of the length of time the service pipe here involved, which was part of its system, had been in the ground, and the question as to whether or not this knowledge was not such as to put it on inquiry should not have been taken from the jury * * *."

Furthermore, Judge Gardner also said (A. 16):

> "* * * The pipe in question was a part of its system through which it transported its dangerous product and it knew, or was chargeable with knowl-

edge, that this service pipe had been in the ground for some twenty years. It, and it alone, had the means of detecting leaks in its gas system and it, and it alone, had the right to repair such leaks * * *."

We have set forth the above quoted portions of his dissenting opinion because they again demonstrate that he had misconstrued the evidence in arriving at his conclusion. There was no evidence which would establish that the defendant should have known that this service pipe "had been in the ground for some twenty years", in view of the actual testimony which we have described above. There was no evidence that the defendant alone "had the right to repair such leaks", in view of the provision of the regulations that it was the customers' duty to repair leaks in service pipes inside the curbline.

The dissenting opinion of Judge Gardner is subject to a further criticism in that it proceeds on the theory that the trial court failed completely to charge the jury "to the effect that knowledge of facts or circumstances which would cause a reasonably prudent person so situated to investigate, where a reasonable investigation would disclose the presence of an unsafe pipe." (A. 14). What Judge Gardner overlooked in so stating was that the trial court, not once, but on many occasions throughout his charge, including an additional charge in response to a direct request from the jury, during the course of its deliberation, stated that it was not necessary for the defendant to have actual knowledge of the location of a defect and the leakage of gas from the service line; that it would be sufficient in order to make the defendant liable "if defendant had knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that

said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line if it was immediately continued to be used to transport natural gas." The trial court repeatedly told the jury that, if they found knowledge of such facts and circumstances, then "it may be said that the defendant had knowledge of facts sufficient to cause it to reasonably act in some respect as to the service line in question." (R. 88, 89, 90, 99, 100, 101).

Respondent respectfully submits that such repeated charge by the trial court manifestly makes the dissenting opinion of Judge Gardner and the contention of the petitioners in their petition to this Court a misconstruction of the trial court's charge to the jury. A careful and complete reading of that charge clearly demonstrates that the jury was fully and fairly charged concerning the duty of the defendant, when the charge is read and considered in its entirety.

It should also be noted that the trial court, with full opportunity to observe and be fully acquainted of proceedings, including the jury's request for further instructions, was completely satisfied that the jury was not misled, under the evidence. That court made this statement to the jury after its verdict had been reported (R. 103):

> "* * * I say to you if I had been passing upon the facts in the case I would have returned the same kind of verdict under the facts here, because definitely there was no notice of any actual gas escaping made known to the defendant in this case. Nobody ever smelled any gas around this place and it seems with that kind of a break in the line there would have been certain disruptions sufficient so that somebody would have smelled gas there if there had been any gas escaping for a considerable period of time, and I don't think that defendant had any notice of a defect

in the line. Because one piece of pipe lying in the ground might be corroded so it has to be taken out does not necessarily indicate that all pipe in the same area is defective or requires the taking up of every other pipe in the neighborhood."

It is significant to note that he stressed that there was no evidence of any notice of any gas actually escaping and that no one was shown to have smelled any gas at this location. If, as contended by the plaintiffs, gas had been escaping from a hole as large as the one found in this pipe after the fire, plaintiffs' own experts had established that it would have been escaping under four pounds of pressure and that 4,100 cubic feet of gas per hour would have escaped from the pipe, if the soil had not been around it for a period of six months (R. 42) (S. R. 12). Yet, there was not one iota of testimony or evidence that gas was detected by anyone although the building was continuously in operation. It appears logical (as stated by the trial court in the above comment) that no such break could have existed without someone having detected the odor of gas.

It is also significant that the court stressed in the above comment that merely because one piece of pipe had been corroded to the extent it had to be removed, would not necessarily give notice that all pipe in the same area was defective. This was supported by the positive testimony of plaintiffs' own experts that corrosion is a varying process; that the rest of this pipe was in fairly sound condition; that a different degree of corrosion was encountered just twenty inches from this hole (R. 40) (S. R. 11); that even using a magnifying glass the hole in the elbow was the only hole in the pipe (S. R. 16).

The foregoing comment of the trial court was a sound analysis of the evidence. The jury's verdict clearly indi-

cates that they agreed. It demonstrates that a correct result was reached under the evidence in the trial of this case.

The Court of Appeals, in its opinion, stressed that the judgment of the trial court and its interpretation and application of the Missouri law should not be reversed unless it was shown that such interpretation was the result of "a clear misconception or misapplication * * * of local law" and that the burden of so demonstrating rests upon the appellant (A. 7). It obviously relied to a great degree (and properly so) upon the trial judge and his appraisal of the evidence, as demonstrated by the comment we have quoted. The Court of Appeals stressed that point in quoting verbatim from *Skelly Oil Co.* v. *Holloway et al.*, 8 Cir. 171 F.2d 670, as follows (A. 4):

> " 'The mere statement of the evidence shows how difficult it is for an appellate court to appraise it fairly from the printed record, and how important, if not decisive, in such an appraisal was the opportunity which the trial court had to hear and observe the witnesses on the stand. Obviously, the trial court might have resolved the issues of fact in favor of defendant. But we cannot say that the opposite conclusion is without substantial basis in the evidence or that upon a consideration of all of the evidence it is clearly erroneous.' "

So in this case, upon a consideration of all the evidence, it cannot be said that the judgment in the trial court was "clearly erroneous". On the contrary, it was supported by "substantial basis in the evidence".

Petitioners contend that the Court of Appeals' decision conflicts with the controlling state law as announced in *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S.W.2d, and, in so doing, rely heavily upon the statement by Judge

Gardner in his dissenting opinion that the decision was contrary to the *Golden* case. A careful reading of the dissenting opinion of Judge Gardner reveals that he contended that the decision was contrary to the *Golden* case, because of his erroneous conclusion that the evidence established that defendant's "system included service lines and it had the exclusive right to maintain, inspect and control these lines, at least up to the property lines of the consumers. It, and not the plaintiffs, had all the attributes of ownership of its system of lines lying in the public street through which it transported its gas to consumers * * *." (A. 13). We believe that we have completely examined and discussed the evidence which demonstrates the misconstruction upon which such statement was made. However, relying upon that misinterpretation of the evidence, Judge Gardner then criticized a portion of the trial court's charge in the following language (A. 13):

> "In the instant case the court instructed the jury that:
>
> '* * * Under the law there was no duty or obligation on the part of the defendant to maintain the gas service line located between the shutoff cock and the curb on Moreau Street leading up to the meter next to the building, in a safe condition or to *make any physical inspection of that line to determine whether any gas was actually leaking from the line prior to the time of the occurrence in question.*'" [Emphasis supplied].

Yet, such portion of the charge was a correct statement of the Missouri law, under the evidence in this case. As previously pointed out, there was no evidence whatsoever of any ownership by the gas company or its predecessor. There was no evidence that the defendant's pred-

ecessor had installed the pipe. There was the positive evidence that its rights under the ordinance gave the predecessor no authority to install beyond the curbline. The rules and regulations themselves clearly showed that maintenance and ownership of a service pipe beyond the curbline was to be in the customer. As such there was no duty on the part of the gas company to make any physical inspection of the service line in question to determine whether gas was actually leaking from it. As was said in *Skelly Oil Co.* v. *Holloway*, 171 F.2d 670, 674:

> "Under the law of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with a duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers."

The Eighth Circuit in that case also pointed out that the duty of one distributing gas to the public is to exercise ordinary care, under the circumstances attending its operations, "to maintain its facilities" in a reasonably safe condition. That holding had repeatedly been restated by the Eighth Circuit in *Gas Service* v. *Helmers*, 179 F.2d 101; *Gas Service Co.* v. *Payton*, 180 F.2d 505; *Gas Service Co.* v. *London & Lancashire Insurance Co.*, 188 F.2d 404 and *London & Lancashire Insurance Co.* v. *Gas Service Co.*, 200 F.2d 783.

Petitioners have attempted repeatedly to escape the effect of this well established rule by arguing that all those cases dealt with a situation where the service line was within the customers' property line, whereas the service line in this case, even though owned by the customer, was located under the street. They have attempted to read into those decisions language distinguishing between pipes "on the property" and pipes "not on the property". It is respectfully submitted that none of these decisions

was based upon the *location* of the service pipe. All of them were decided on the fact of *ownership* of the pipe by the customer, regardless of its location. In all those cases it so happened that the customer's service line involved was within the customer's property line. The thinking of the Eighth Circuit in that connection was clearly demonstrated in the *London & Lancashire Insurance Co.* v. *Gas Service Co.*, case, *supra*, where it said, referring to a previous appeal of the case:

> "On appeal the judgment of the District Court was reversed and remanded for further proceedings on the ground that on the facts as established by the evidence the Gas Company was under no duty under a controlling Missouri law to inspect the *property owners' service line.*" [Emphasis supplied].

It should be noted that the court did not say that the gas company was under no duty to inspect the line on the property of the customer. Rather, it stated that it was under no duty to inspect the property owner's service line. It was, therefore, not error for the trial court to instruct the jury in this case that the gas company had no duty to inspect Martin's service pipe. That clearly is the law of Missouri.

What Judge Gardner did not consider, in ruling that the decision in the present case contravened the ruling in the *Golden* case, was the fact that the *Golden* case contained undisputed evidence that the service pipe which was defective was a pipe owned by the gas company. It was not a service pipe which, as here, was owned by the customer. There is no question but what, as to a pipe owned by it, a distributor of gas has a duty to inspect and maintain that line. It was on the basis of such proof of ownership by the gas company that the Supreme Court of Missouri, in the *Golden* case, held that:

"* * * Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge * * *."

The duty referred to by the court in the quoted portion of the opinion properly would exist where a gas company was shown to be the owner of the pipes which were found to be leaking, as was the defendant in the *Golden* case. Such ownership by the gas company also existed in the other cases cited and relied upon by petitioners, *Mesmer* v. *St. Louis County Gas Co.*, Mo.App., 42 S.W.2d 963 and *Barrickman* v. *National Utilities Co.*, Mo. App., 191 S.W.2d 265. All those cases are thus distinguished from the case at bar and from the case of *Skelly Oil Co.* v. *Holloway*, *supra*, and the cases following it, decided by the Eighth Circuit, which are cases controlling this case and announcing the applicable rule of law.

In addition to this it must be noted that Judge Gardner, in his dissent, limited his consideration of the trial court's charge to the above quoted portion. After thus correctly stating the law as to there being no continuing duty on the part of the defendant to inspect the service line in question, because it was owned by Mr. Martin, the trial court then proceeded carefully and meticulously, to instruct the jury as to the duty of the defendant if and after the defendant "had some knowledge of the leakage of gas from that particular service line, or notice of a defect in said line which would imminently cause gas to leak therefrom if it was not replaced or repaired * * *." (R. 87). With reference to such "knowledge" or "notice" the trial court repeatedly told the jury that "under the law it was not necessary that the defendant have actual knowledge of the location and size of the defect and leak of gas from the service line in question * * *." (R. 88). As previously set out herein, the court carefully told the jury

that it would be sufficient to show knowledge or notice on the part of the defendant, if it had "knowledge of facts and circumstances sufficiently pertinent in character to enable a reasonably cautious and prudent person engaged in the business of distributing natural gas to take notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line * * *." (R. 88).

It is respectfully submitted that this portion of the court's charge completely and fully submitted the duty of the defendant; that it included the requested instruction offered by petitioners except that, instead of using the requested language "where a reasonable investigation would disclose the presence of an unsafe pipe." the trial court substituted the phrase "notice that said service line was leaking gas or was so defective that natural gas would imminently escape from some part of said line".

Petitioners next contend that the Court of Appeals' decision conflicts with controlling state law in taking the question of ownership and control from the jury and ruling as a matter of law that the pipe in question was owned by Mr. Martin. They have cited four cases which they say announced the law of the State of Missouri to be that ownership is a jury issue; that possession and control of property raises a presumption of ownership and that control is possession. They contend that the Court of Appeals ignored "the fact that defendant's franchise right to put its pipe in all streets of Tipton, was paramount to that of the abutting owner." They then rely heavily again upon the dissenting opinion of Judge Gardner, and, on Pages 10 and 11 of their petition, have quoted portions of that dissent, which we previously have demonstrated were based upon a misconstruction of the evidence. We will not burden the Court with a repetition of the facts

demonstrating this misconstruction, but respectfully refer it to what has previously been pointed out by us in that connection.

The record in this case was completely devoid of any evidence of company ownership of the pipe in question. Nor was there any evidence from which a presumption of ownership by the company could be raised which would supply a jury issue. Such a presumption cannot arise in the face of established facts. This is the settled law in the State of Missouri. Thus, in *Gregg* v. *Page*, Mo.App., 257 S.W.2d 161 (one of the cases cited and relied upon by petitioners), the court said:

> "Presumptions concerning title are never allowable against ascertained and established facts. Thus, a presumption of ownership from possession is not allowable against ascertained and established facts to the contrary.
>
> "We think that and similar language in other citations is another way of saying that such a presumption is rebuttable. All authorities agree that it is a rebuttable presumption * * *."

The established facts in the present case clearly showed ownership of the pipe in Mr. Martin. Defendant's Exhibit 31 (R. 62, 63), the ordinance of the City of Tipton adopted July 21, 1930, granted a franchise to the predecessor of this company to install and operate a gas plant and distributing system in that city. The franchise was for a period of twenty years after the date of passage of the ordinance. It remained in effect until it was replaced by Plaintiffs' Exhibit 30 (R. 61), Ordinance No. 221 of the City of Tipton passed May 3, 1948, which gave the defendant company a franchise for twenty years for the operation of such a system, and repealed the franchise granted by Defendant's Exhibit 31. We again quote Section 4 of

the original franchise ordinance which provided as follows:

> "Grantee shall furnish free of charge and install for his customers reliable meters or other instruments for the measurement of gas sold and shall keep the same in repair without cost to the customers; all meters or other devices used by the Grantee shall at all reasonable times be subject to inspection by the City and the City shall have the right to test such meters and devices at reasonable times. Grantee shall also furnish and install at his own expense proper and suitable and adequate service for each customer *from mains to the curb line, if such mains are located in the street,* and from mains to the property line, if the same be located in the alleys, and all such mains and laterals shall be adequate in size and construction." [Emphasis supplied].

Again we respectfully call attention to the fact that the specific wording of this franchise ordinance established that the predecessor company was neither obligated nor authorized to install service for any customer beyond the curb line, where the mains were located in the street. The main in question in this case was shown by all the evidence to be located in the street west of the Martin building.

Absent positive evidence to the contrary, how can it be presumed that the predecessor company would have undertaken to install service lines for a customer beyond the point authorized by the franchise? It is true that petitioners attempted to show, by the testimony of Mr. and Mrs. Hardy, that the predecessor company had, on occasion, installed customers' service lines (R. 49, 50). However, the original contract executed by Mr. Hardy with the predecessor company was offered in evidence as Defendant's Exhibit 33 (R. 139). Paragraph 2 of that exhibit provided as follows:

"Upon completion of said service line from Applicant's curb box to said basement, *Applicant agrees to accept the same as his sole property* and agrees that thereafter he will hold the Company free, clear and harmless from any and all liability, damage, charge, cost or expense by reason of accidents of every kind and nature resulting directly or indirectly from the use of said service line and conveying gas to Applicant's premises." [Emphasis supplied].

Under the quoted portions of that contract, even when the predecessor company did install a service line, it was installed under an agreement that the line would become the sole property of the customer after installation. Such contract proved nothing in the way of any obligation for maintenance or ownership of the line in question at the Martin building. On the contrary, it was evidence of lack of ownership or control.

Petitioners' evidence completely failed to contradict the franchise authority for installation only to the curb line. There was no evidence upon which to base any inference that the service line in question was installed by the predecessor of the defendant company. We again refer this Court to what previously has been said that the only witnesses offered by the petitioners during the trial of this case, Witnesses Brant and Thixton, gave no testimony on the question of when this particular service line was installed or on the question of who installed it. We also refer the Court to the testimony of Witness Lonnie Bell dealing with the installation of the meter on the west side of the building in 1939 (the very meter to which this service line was connected) and the fact that there was evidence then that the ground had been freshly dug up in that vicinity. Accordingly, all the evidence in this case prohibited a presumption of ownership in the defendant and was the basis upon which the trial court properly in-

structed the jury, as a matter of law, that ownership of the pipe in question was in Martin. The Court of Appeals on such evidence, also saw no reason to discuss the question of ownership in its opinion.

II.

Plaintiffs Were Not Deprived of Their Right of Review.

Under this point in their petition, the petitioners make a broad and sweeping statement that the Court of Appeals was guilty of "a clear abdication by that court of its lawful duty and function as a court of review." They appear to make this contention upon the basis that the opinion of the trial court fails to mention cases decided by the courts of the State of Missouri, which petitioners had contended were the controlling decisions in this case. Manifestly, however, no purpose would have been served, and it would unduly lengthen the opinion of the Court of Appeals to cite cases decided by the Missouri courts where those decisions were *not* controlling of issues in this case. Those decisions of the Missouri courts were not applicable to this case; they were not necessary to a decision in this case, and the statement made by Judge Gardner to the contrary in his dissenting opinion was, as previously pointed out, based upon a misconstruction of the evidence and a misconstruction of the trial court's charge.

This case was completely within the purview of the cases of *Skelly Oil Co.* v. *Holloway et al.*, 8 Cir., 171 F.2d 670; *Gas Service Co.* v. *Helmers*, 8 Cir., 179 F.2d 101 and *Gas Service Co.* v. *Payton*, 8 Cir., 180 F.2d 505, all cited by the Court of Appeals in its opinion. Each of those cases announced and followed the Missouri rule applicable in a case where the gas company does not own the pipe involved. Thus, in *Skelly Oil Co.* v. *Holloway, supra*, the

Court of Appeals announced the rule in the following language (l.c. 674):

> "Under the law of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with the duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers."

Petitioners contend that the *Skelly Oil Company* case was one "which, on its facts, was not remotely in point". On the contrary, respondent respectfully submits that, on the facts, the *Skelly Oil Company* case was directly in point. We believe that petitioners are led into their persistent contention that there was error both in the trial court and in the Court of Appeals, because of their unwillingness to accept, and their failure to admit, the distinction that exists between the established facts in the present case and the established facts in *Golden* v. *National Utilities Company, supra,* and those cases announcing the same rule of law. What petitioners fail to admit and accept is that the *Golden* case, and like cases, have dealt with the duty of a distributor of gas with reference to the distribution system and pipes *owned* by it, whereas the *Skelly Oil Company* case, and all cases in harmony with it, have dealt with a set of facts in which the pipe in question was *not owned* by the gas distributor. In the former case, *i.e.*, where the pipes are owned by the distributor, there is no question but what the distributor has a continuing duty to inspect and determine the condition of the pipes. In the latter situation, *i.e.*, where pipes are not owned by the distributing company, the distributor has no duty to inspect or maintain such pipes. In the latter cases it is *only* where the distributor has knowledge of circumstances which should be notice to it that there might be a leak of gas in the customer's pipe that it may

be held liable for failure to act. That matter was fully covered by the trial court in his charge to the jury, as stated by the Court of Appeals in its original opinion. Ownership in Mr. Martin having been established by the evidence, there was no reason for the court to discuss either the *Golden* case or any of the other cases decided in accordance with it. In such circumstances, petitioners had an adequate and complete review of their case by the Court of Appeals. Judge Gardner's dissent, based as it was upon a misconstruction of the evidence, undoubtedly led to the petition to this Court. However, petitioners have fallen into the same error which is apparent in the dissenting opinion of that Judge in overlooking and in failing to recognize the positive evidence refuting ownership by the gas company of the pipe in question. The majority of the Court of Appeals obviously recognize this error because they refused, unanimously, to grant a rehearing.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the petition should be refused and that no writ should issue in this case.

Respectfully submitted,

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